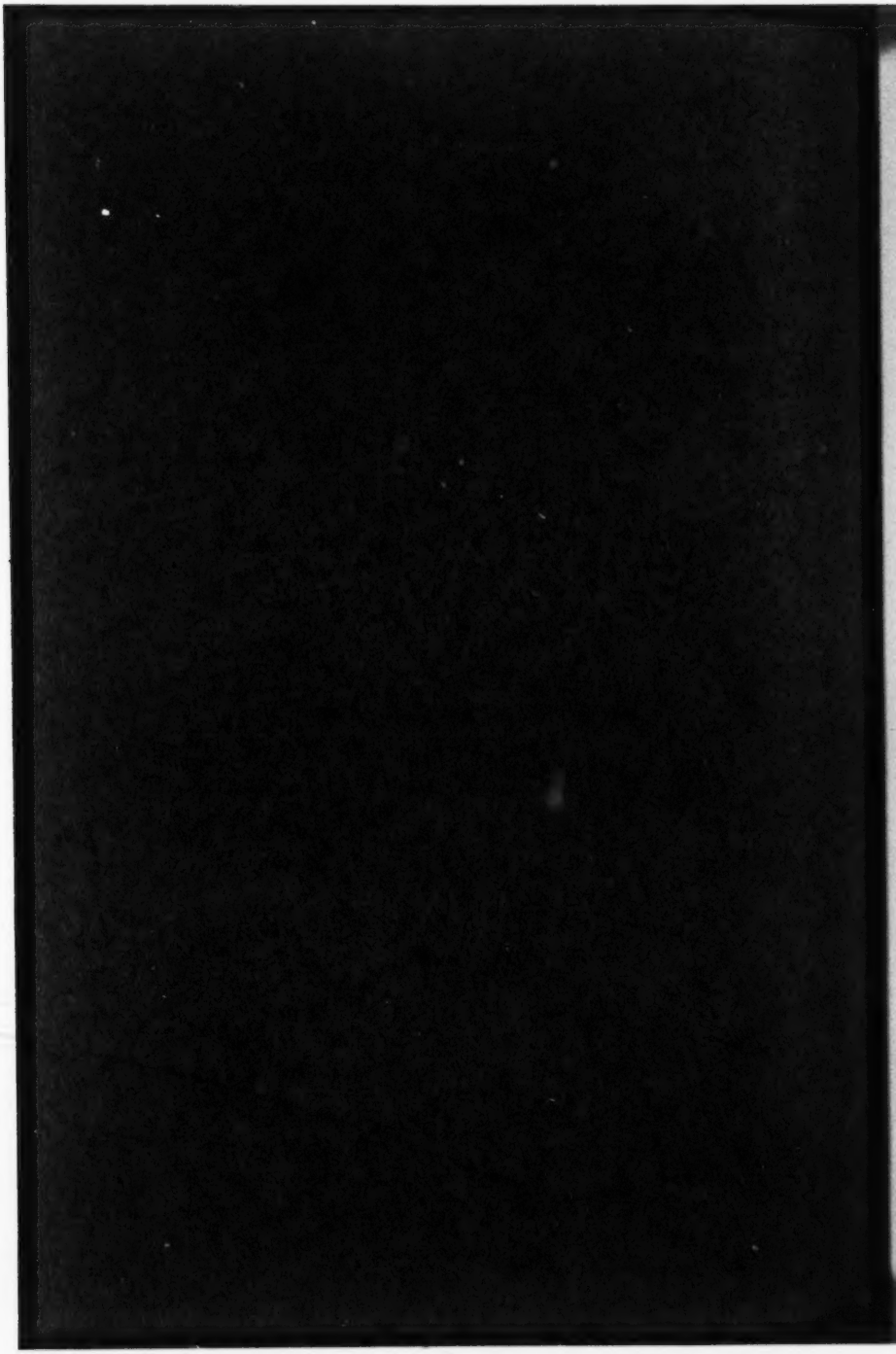

INDEX

CITATIONS

691610—46

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 971

JOSEPH AGO STASSI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 40–43) is reported at 152 F. 2d 581.

JURISDICTION

The judgment of the circuit court of appeals was entered December 28, 1945 (R. 43), and a petition for rehearing was denied February 18, 1946 (R. 72). The petition for a writ of certiorari was filed March 19, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII

of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether, as applied to petitioner, Section 626.1 (b) of the Selective Service Regulations, which requires a classified registrant to inform his local board of any facts which "might result in the registrant being placed in a different classification," is too vague and indefinite to support a criminal prosecution and conviction for knowingly failing to comply with it.

STATUTE AND REGULATIONS INVOLVED

Section 11 of the Selective Training and Service Act of 1940, 54 Stat. 885 (50 U. S. C. App. 311), provides in part:

> Any person * * * who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *

The applicable Selective Service Regulations provided as follows during the greater part of the period involved in this case:

> 622.22 Class II–B: *Necessary man in war production.* (a) In Class II–B shall be

placed any registrant who is found to be a "necessary man" in war production. (8 F. R. 11346.)

(b) Class II–B deferments shall be for a period of 6 months or less. If there is a change in the registrant's status during the period of deferment in Class II–B, his classification shall be reopened and considered anew. At the expiration of the period of the registrant's deferment in Class II–B, his classification shall be reopened, and he shall be classified anew. In again classifying the registrant, care should be taken not to impede the war production program. The registrant should be again classified in Class II–B for a period of 6 months or less if such classification is warranted and if the registrant's employer has made a reasonable but unsuccessful effort to secure or train a replacement for the registrant during the period of deferment. The same rule shall be applied when again classifying such a registrant at the end of each successive period for which he had been classified in Class II–B. (6 F. R. 6607.)[1]

* * * * *

[1] Subsection (b) was amended on April 20, 1944 (9 F. R. 4385), to read as follows:

"(b) In Class II–B shall be placed any registrant who by reason of his occupation is found to be 'making a contribution' to war production and who is:

(1) Age 38 or over, or

(2) Age 18 through 37, and

(A) Who is found to be qualified for limited military service only, or

(B) Who is found to be disqualified for any military service. (This shall be deemed to include every registrant who

622.24. *"Necessary man" defined.* A registrant shall be considered a "necessary man" in war production or in support of the war effort, including training and preparation therefor, only when all of these conditions exist: (1) He is, or but for a seasonal or temporary interruption would be, engaged in war production or in support of the war effort; (2) his removal would cause a serious loss of effectiveness therein; and (3) he cannot be replaced. (8 F. R. 11346.)[2]

* * * * *

626.1. *Classification not Permanent.* (a) No classification is permanent. * * *

(b) Each classified registrant shall, within 10 days after it occurs, * * * report to the local board in writing any fact that might result in the registrant being placed in a different classification. (6 F. R. 6843.)

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would be placed in Class I–C, Class IV–C, or in Class IV–F if it were not for the fact that he qualifies for classification in Class II–B under the provisions of this section.)"

[2] On April 20, 1944, this Section was amended (9 F. R. 4385), as follows:

"622.24 *'Necessary man' defined.* A registrant shall be considered a 'necessary man' only when all of these conditions exist: (1) He is, or but for a seasonal or temporary interruption would be, engaged in war production or in support of the war effort; (2) his removal would cause a serious loss of effectiveness therein; (3) he cannot be replaced; and (4) he meets such other conditions and qualifications as may be prescribed from time to time by the Director of Selective Service."

STATEMENT

Petitioner was indicted in the District Court of the United States for the Eastern District of Louisiana in one count charging that he knowingly failed to perform a duty required of him by Section 626.1 of the Selective Service Regulations, in violation of Section 11 of the Selective Training and Service Act. The indictment alleged that although petitioner knew he had been given a classification based upon representations that he was a full time worker in a shipyard, he did not inform the local board, as Section 626.1 required of him, that in fact his principal occupation was that of operating a barroom. (R. 3–5.) After a jury trial, he was convicted (R. 26) and sentenced to imprisonment for 30 months and to pay a fine of $500 (R. 30). Upon appeal to the Circuit Court of Appeals for the Fifth Circuit, the judgment was affirmed (R. 43).

Petitioner has not caused the evidence which was adduced at his trial to be incorporated in the record on appeal. The facts revealed by the indictment (R. 4–5), which must be taken as true in these circumstances (cf. *Miller* v. *United States*, 317 U. S. 192), show that petitioner's principal occupation was the operation of a barroom in Hammond, Louisiana. He registered with Local Board No. 2 for the Parish of Tangipahoa, Louisiana, pursuant to the requirements

of the Selective Training and Service Act of 1940. In 1943, the Delta Shipbuilding Co., Inc., represented to petitioner's local board that petitioner was a full time worker averaging forty-eight hours a week at its plant. On the basis of these representations, the local board on or about July 1, 1943, deferred petitioner as a war worker. Petitioner knew that he had been deferred because of these representations to the local board. Yet, despite his knowledge, he did not inform the local board that his principal occupation was that of operating his barroom and that he worked for the Delta firm only intermittently as follows:

Month:	*Days worked*
July 1943	11
August 1943	0
September 1943	0
October 1943	0
November 1943	10
December 1943	9
January 1944	5
February 1944	21
March 1944	4
April 1944	0
May 1944	0

ARGUMENT

This is not a prosecution of a bona fide war worker who, because of illness or for some other reasons beyond his control, was unable to work full time. Rather, it is the case of a barroom operator who, knowing that he had been deferred from the draft as a full time worker in a shipyard, did not inform his local board that, in fact,

his principal occupation was the operation of a barroom, and that in a period of eleven months, during which he was deferred as an essential war worker, he worked in the shipyard for a total of only sixty days. Petitioner does not deny these facts. His contention is that Section 626.1 (b) of the Selective Service Regulations, upon which the indictment is predicated,[3] is so vague and indefinite as not to provide an ascertainable standard of guilt (Pet. 8, 10–13). We agree that if petitioner is right in this contention, the judgment must be reversed (see *M. Kraus & Bros., Inc.* v. *United States,* No. 198, decided March 25, 1946), but we think it plain that, at least as applied to the facts of this case, the regulation is not unconstitutionally vague and indefinite.[4]

Section 626.1 (b)[5] requires that "Each classi-

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[3] Section 11 of the Selective Training and Service Act makes it an offense, *inter alia*, knowingly to fail to perform a duty required by the Selective Service Regulations.

[4] The circuit court of appeals held that the regulation is valid, and it also concluded that the indictment charged an offense under the provisions of Section 11 denouncing the making of false statements and evasion of service (R. 42). Petitioner contends that the court erred in relying upon this latter theory in affirming the conviction (Pet. 7, 9–10). The trial court submitted the case to the jury on the theory that petitioner was charged with failing to perform the duty required of him by Section 626.1 (b) of the Selective Service Regulations. Hence, we do not rely on the alternative theory advanced by the circuit court of appeals.

[5] Paragraph (a) of that section provides that "No classification is permanent."

fied registrant shall, within ten days after it occurs, * * * report to the local board in writing any fact that might result in the registrant being placed in a different classification." The question which petitioner raises is whether this regulation fairly advised him that it was his duty to inform his local board that his principal occupation was that of a barroom operator and that he was not, as he knew the local board had been informed, a full time shipyard worker.[6]

Section 626.1 (b) does not enumerate every fact of which a registrant is required to inform his local board, because extensive detail of that nature is not feasible. Instead, the requirement is expressed in terms which must be applied to specific factual situations. Conceivably there may be hypothetical cases where Section 626.1 (b) might be so vague in its application as to preclude a criminal prosecution for failing to comply with it. But this case furnishes no occason for such speculation. Cf. *Robinson* v. *United States,* 324 U. S. 282, 285. It is undisputed that petitioner knew that he had been deferred because the local board had been informed that he was a full time

[6] In the summer of 1943, the Selective Service System was stringently enforcing its "work or fight" policy, which required registrants in nonessential occupations such as petitioner's to take work in war jobs or be drafted. See *Selective Service as the Tide of War Turns*, the third report of the Director of Selective Service, pp. 53, 70, 650–651. It is a fair inference that this policy prompted petitioner to take employment with the Delta shipbuilding firm.

shipyard worker. It is likewise undisputed that petitioner's principal occupation was not working in a shipyard; it was operating a barroom. These are facts which not only "might result in the registrant being placed in a different classification," as the regulation provides; they are facts which, of course, required a different classification. It is difficult to conceive of a registrant who, knowing these facts, would not be aware that they were facts which should be brought to the attention of the local board. Particularly is this so where, as in this case, the registrant has actual knowledge of the requirements of Section 626.1 (b).[7] We think no reasonable man could possibly have any question that the facts in petitioner's case were facts which had a direct bearing on his classification and were thus facts which, in the language of the regulation, "might result in the registrant being placed in a different classification."

Moreover, any possible doubt in this case whether petitioner honestly was unable to determine from Section 626.1 (b) whether he was obliged to notify his local board of the true facts, is dispelled by the fact that the jury was required to find that petitioner knowingly failed to perform the duty required of him by the

[7] The trial judge instructed the jury that Section 626.1 was binding on petitioner only to the extent that he had knowledge of it (R. 66). The verdict thus establishes petitioner's knowledge in this respect, and we do not understand petitioner to contend that he was unaware of the terms of the regulation.

regulation. The trial court instructed the jury that "the Act does not denounce as criminal, every failure to perform a duty imposed by the statute or regulations, but only seeks to punish a person 'who shall knowingly fail or neglect' his duty. There must be a specific wrongful intent. An actual knowledge of the existence of an obligation and a wrongful intent to evade it is of the essence." (R. 62.) Certainly, a specific wrongful intent, which the jury found in this case, removes any possibility that petitioner was convicted for violating an "unknowable something." See *Screws* v. *United States,* 325 U. S. 91, 105. "A mind intent upon willful evasion is inconsistent with surprised innocence." *United States* v. *Ragen,* 314 U. S. 513, 524.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
IRVING S. SHAPIRO,
Attorneys.

APRIL 1946.

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